Editor's note: Reconsideration granted; decision reaffirmed by 65 IBLA 26 (June 22, 1982); appealed - reversed, Civ. No. A82-396 (D. Alaska Aug. 8, 1985), 615 F.Supp. 990; Remanded to BLM by order dated Oct. 1, 1985 -- See 66 IBLA 37A & B

MARY OLYMPIC

IBLA 76-627 Decided April 14, 1980

Appeal from decision of Alaska State Office, Bureau of Land Management, denying a request to reopen Native allotment file, A-052511.

Affirmed.

1. Alaska: Native Allotments

   A request, filed in 1975, to reopen a Native allotment application, which had been finally rejected in 1967, is barred by the 1971 repeal of the Native Allotment Act, since no application was "pending" on the date of the repeal.

2. Alaska: Native Allotments

   The Alaska Native Allotment Act gives a qualified person the right to select land. This inchoate right is nonalienable, nontransferable, and noninheritable, and it terminates with death. But where an allotment selection has been made and the applicant fully complies with the law and regulations and accomplishes all that is required to be done, the right to allotment is earned and becomes a property right which is inheritable. No rights inure to the heirs of the deceased applicant where BLM was unable to verify use and occupancy for the lands described in the application and the applicant did not correct the application to reflect the lands actually used.

3. Equitable Adjudication: Generally

   Equitable adjudication cannot be properly invoked on behalf of an appellant who has no interest in the entry subject to the proposed adjudication.

4. Alaska: Native Allotments -- Equitable Adjudication: Substantial Compliance

   Where a Native allotment applicant has not established use and occupancy of the lands identified in his or her allotment application, the applicant has not substantially complied with the Alaska Native Allotment Act and equitable adjudication under 43 CFR 1871.1-1 cannot be properly invoked.

APPEARANCES: James H. Holloway, Esq., Lucy M. Lowden, Esq., Alaska Legal Services Corporation, for appellant.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Mary Olympic has appealed a decision of the Alaska State Office, Bureau of Land Management (BLM), denying her request that BLM reopen the Native allotment file, A-052511, of her father, Alexis Gregory.

On July 5, 1960, the Bureau of Indian Affairs (BIA), filed a Native allotment application and evidence of use and occupancy under the Alaska Native Allotment Act, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970), 1/ and implementing regulations at 43 CFR Part 67 (1959), on behalf of Alexis Gregory. The application claimed use and occupancy from 1922 and identified improvements consisting of a log cabin and two log caches. On March 25, 1961, BLM conducted a field examination of the allotment. The examiner reported that no improvements were found on the allotment as described in the application and the nearest improvements, approximately 1 mile northeast, did "not appear to be of the size and number claimed by the applicant." Witnesses, however, had substantiated Gregory's use of land in an area approximately as plotted on the map accompanying the allotment application. The examiner then recommended: "The applicant has undoubtedly complied with the regulations as to use of the land in the area but he should be requested to submit a better description that will include his improvements and not exceed 5 acres so that the improvements can be located and positively identified."

1/ The Alaska Native Allotment Act was repealed subject to pending applications by section 18(a), Alaska Native Claims Settlement Act, 43 U.S.C. § 1617 (1976).

BLM again examined the land described in the allotment application on September 27, 1963, with the same results; no improvements or other evidence of use and occupancy were found. The examiners in this instance recommended:

> It appears that the applicant should be requested to submit a description for the land on which his improvements are actually located. However, if the present description actually describes the land desired by the applicant, the evidence of occupancy should be rejected as the applicant has not actually occupied and appropriated the land to his own use.

Following this report, BLM notified Gregory by a certified letter dated February 13, 1964, that he should submit a correct description of the lands embracing his improvements within 30 days or his application would be rejected. Gregory signed the returned receipt for the letter, but no reply letter was ever received by BLM.

The next action on the case occurred when BLM, by memoranda dated April 5, 1967, and June 12, 1967, requested that BIA contact Gregory, find out if the description of his lands was in error, and assist him in filing a new application. On June 13, 1967, BIA informed BLM that they had not succeeded in contacting him. BLM contacted BIA again in October 1967 but BIA had still not located Gregory. They agreed that the allotment application should be rejected and BLM issued a decision to that effect on October 13, 1967. The copy of the decision sent to Gregory was returned to BLM marked "deceased."

By letter dated November 24, 1975, Alaska Legal Services Corporation, acting on behalf of appellant Mary Olympic, informed BLM that Gregory had died in early 1967 and requested that his allotment file be reopened so that appellant could show "that the area where the improvements are is actually the area [her father] was claiming in his allotment."

In a letter dated January 23, 1976, BLM refused to reopen the case stating that:

> A decision rejecting the application was not issued until October 13, 1967, and according to your letter, Mr. Gregory died in the early part of 1967. Therefore, the applicant had at least 3 years to submit a new description. Furthermore, since Mr. Gregory did not submit a revised description before his death, Ms. Olympic would be unable to show the area of improvements. Thomas S. Thorson, Jr., 17 IBLA 326 (1974) states:
>
> > No rights inure to the estate of a deceased Native allotment applicant where the application, filed by the deceased during his lifetime,

> does not show prima facie entitlement and where a basic amendment to the application would be required to conform it with the law, rules, or regulations.

Thereafter, appellant requested reconsideration of the BLM position. Appellant argued that if her father had been allowed to accompany the field examiner, the problem would have been reconciled since "[i]t is obvious that a mere error in locating the land on paper is what transpired." She stated that her father was at a very old age and "[m]ost likely" was "too ill to attend to the BLM letter." They urged that guidelines issued in 1974 requiring that the applicant or a representative accompany the field examiners allow reopening this case and attempted to distinguish Thomas S. Thorson, Jr., supra.

On April 27, 1976, BLM issued the decision formally denying the request to reopen the Native allotment file from which the instant appeal is taken. The decision again cited the rule previously quoted from Thomas S. Thorson, Jr., supra. In addition, BLM applied the long standing principle that an Alaska Native must have completed "all that was necessary and all that he could do to become entitled to the land before his demise" in order to have acquired an inheritable right to the land. BLM states that Gregory did not do "all that was necessary" because his use of the land applied for -- that land described in his application -- was not verified by the field examination nor was there any indication from Gregory himself that an error in the description had been made. BLM also indicated that the guidelines referred to by appellant were not an appropriate basis for reopening the case of deceased applicants, even if they had existed at the time BLM decided the case. Finally BLM indicates that BIA, as trustee of Gregory's estate, would be the proper representative to request a reopening of the case not appellant.

In her statement of reasons, appellant first asserts that Alaska Legal Services properly represents her in requesting the reopening of her father's Native allotment application file. 2/ In support of reopening the application, appellant argues that:

1. The application showed entitlement to an allotment during her father's lifetime;

2. The procedures used in processing the application were not fair and under the 1974 guidelines, the application would have been approved; and

3. The Department of the Interior owes the applicant and his heirs a duty of trust and thus equitable adjudication should be invoked to reopen the application file.

2/ On this point, appellant is clearly correct. See Ernest L. Olsen, Jr. (Deceased), 41 IBLA 179, 183 (1979).

[1] At the outset, we wish to examine an issue which was not addressed in the decision below. When Congress enacted the Alaska Native Claims Settlement Act (ANCSA) in 1971 it repealed the Native Allotment Act. See section 18(a) of ANCSA, 43 U.S.C. § 1617(a) (1976). Congress, however, included a savings clause providing for the approval of any allotment application "pending before the Department of the Interior on December 18, 1971," the date of ANCSA's effect. The question is whether any application relating to Alexis Gregory's claim was "pending" as of December 18, 1971. We think that the answer is clearly in the negative.

As we have indicated above, Alexis Gregory's allotment application was rejected on October 13, 1967. The allotment applicant was, at that time, informed of his right of appeal. Admittedly, Alexis Gregory had died by that date. No action was undertaken, however, either by his heirs or anyone else, to reopen the case until Alaska Legal Services Corporation wrote the letter of November 24, 1975.

Had any action been undertaken prior to December 18, 1971, to reopen Gregory's application, consideration of the circumstances of the case might well have permitted BLM to examine the substance of appellant's allegations. Nevertheless, in the absence of such action, there was no application "pending" before the Department because the application had been finally rejected. In effect, appellant had more than 4 years in which to seek a readjudication of the rejection of Gregory's application. By failing to act before the passage of ANCSA, appellant allowed any right to reopen the application to lapse.

In a recent decision styled Barr v. United States, Civ. No. A 76-160 (D. Alaska, January 18, 1980), Judge Fitzgerald examined the legislative history behind the adoption of the savings clause in section 18(a). Therein, the court noted:

> What legislative history there is indicated Congressional concern with applications which had already been filed with the Department of Interior but which had not yet been perfected. In the course of hearings before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs, Congressman Begich used the term "pending" to refer to such filed but unperfected applications:
>
> > MR. BEGICH: . . . Let me ask some short questions. Your bill would repeal the Native Homestead Act of 1906 which enabled the Alaskan Natives to file for surface rights of 160 acres based on use and my information is that approximately 3,000 applications under this Act are

> now pending. Will these pending applications be perfected? You have perfected 341 through March 20, 1971, which means you have a long way to go. By that rate, is it not true that it would take 45 months to handle those remaining?
>
> MR. MELICH: We intend to process as fast as our personnel will allow.
>
> MR. BEGICH: So you will continue to acknowledge those pending applications?
>
> MR. MELICH: Those properly filed applications filed in time will be processed to completion.

The savings clause was apparently directed at such backlogged applications.

(Decision at 9-10; footnote omitted). In the instant case, there was no application in existence, and thus, it could not have been considered backlogged. We hold, accordingly, that acceptance of the request to reopen Alexis Gregory's application is barred by the repeal of the Native Allotment Act.

[2] Even if this claim were not barred by the repeal of the Native Allotment Act, supra, we would be constrained to affirm the decision below. The question would be whether appellant may properly claim to hold an interest in her deceased father's Native allotment application. To put it another way, we must determine whether Alexis Gregory held an inheritable property right in the allotment at his death.

In Larry W. Dirks, Sr., 14 IBLA 401 (1974), this Board examined the nature of the rights granted by the Alaska Native Allotment Act, supra. We held that the Act authorizes a personal preference right to select land; this inchoate right is nonalienable, nontransferable, and noninheritable, and terminates at death. Nevertheless, we also recognized that where an applicant has fully complied with the law and appropriate regulations and has accomplished all that is required to be done at the time of death, then the applicant has earned a right to the allotment and that right is inheritable. In Thomas S. Thorson, Jr., supra, applying the same principle, we held that the right to an allotment is inheritable if at the time of death all that remained to be done was the mere administrative act of issuing an allotment certificate.

In applying this principle to the case at hand, we find that the applicant had not done all that was required to be done or fully complied with the law and regulations by the time of his death because he

had not shown the required use and occupancy of the land identified in his allotment application.

We agree with appellant that her father's allotment application indicated prima facie entitlement to an allotment and for that reason we find BLM's application of the second principle enunciated in Thomas S. Thorson, Jr., supra, to be misplaced. The Gregory application identifies an otherwise unappropriated portion of land and asserts the required use and occupancy. 3/ Prima facie entitlement simply means that on the face of the application, assuming the facts contained in the application are true, the applicant is entitled to an allotment. Once those facts are disputed or disproved, entitlement is no longer assumed and the applicant then has the burden of proving entitlement in fact. That is the situation now before us.

After reviewing Dirks, supra, and the cases cited therein, appellant states that these cases focus on the concept of "selection" and concludes that "where an applicant has made his selection, the allotment right was inheritable." Appellant has construed the term "selection" as used in Dirks, supra, too narrowly and seemingly has ignored the plain language of that opinion. The process of selection involves more then the mere identification of desired lands and assertion of use and occupancy on an application form. It requires full compliance with the law and regulations before actual entitlement is created. Even where an application shows prima facie entitlement to the allotment, BLM must verify the applicant's claim. Once the prima facie entitlement is disproven, the applicant has the burden of doing whatever is necessary to show full compliance. Gregory was not entitled to the allotment at the time of his death because his use and occupancy of the tract for which he applied had not been established. No inheritable interest was created and therefore appellant has no interest to assert as a basis for reopening the allotment file.

Appellant also argues that the procedures used in processing her father's allotment were unfair because no attempt was made to have her father accompany the field examiners as would be the practice under 1974 guidelines. We find no evidence that Gregory was treated unfairly according to standard practice at the time. BLM did not seek to rule on Gregory's allotment application on the basis of the field examiners' reports alone. Rather BLM gave Gregory the opportunity to explain or correct his application. He did not take advantage of that opportunity. If he had responded to the BLM notice, a joint field examination might have been the appropriate means for correcting the problem. Appellant has offered no explanation other than speculation that her father was "most likely" ill as to why he did not respond to

3/ In the Thorson case, the lands identified in the allotment application had been withdrawn from entry and therefore were unavailable for allotment as a matter of law even assuming all other facts were true.

the BLM inquiry. If the problem was "a mere error in locating the land on paper" as appellant now claims, it could have been rectified simply by Gregory. He did not choose to do so. Retroactive application of procedural guidelines for field examinations, which were developed more than 10 years after the examinations in this case occurred, is inappropriate.

[3, 4] Finally appellant urges that the Board invoke equitable adjudication under 43 CFR 1871.1 to reopen the Gregory allotment application file. She argues that there is a fiduciary relationship between the Department of the Interior and Indians which gives rise to a duty to act for the benefit of Indians and that in the case of Alaska Natives, that duty takes the form of searching out lands in the use and occupancy of Natives and protecting them from outsiders.

This Board has recognized that the Department has a responsibility to protect Indian and Native occupancy of public lands. Milton L. Pagano, 41 IBLA 214 (1979); Helen M. Schwiete, 14 IBLA 305 (1974). However, we believe that such protection does not relieve the allotment applicant from meeting the requirements of law. While protection of the Alaska Native is undoubtedly an important reason underlying the availability of equitable adjudication, it is not sufficient reason for invoking equitable adjudication in this case. First and foremost, as we have already stated, appellant has no interest in the allotment on which equity may act. Even if that were not the case, 43 CFR 1871.1-1 requires substantial compliance with the requirements of law. In Francis I. Hunt, 8 IBLA 390 (1972), cited by appellant in support of her argument, the field examiner had recommended that patent be issued for a homestead, and consequently substantial compliance could be found. The requirement to establish use and occupancy of the lands applied for is fundamental to the granting of an allotment under the Alaska Native Allotment Act, supra. We cannot find that Alexis Gregory substantially complied with the requirements for allotment given the undisputed adverse field reports.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

James L. Burski
Administrative Judge

We concur:

Anne Poindexter Lewis
Administrative Judge

Edward W. Stuebing
Administrative Judge